

Memorandum

To: File
CC: David Wiggins
From: Trinity
Date: 2/17/2012
Re: Davenport Forum, February 3rd, Scott County Courthouse, 3rd Floor Courtroom

Attendees

Committee Representation: David Wiggins, Trinity Braun-Arana, Michael Gartner, Barbara Maness, David O'Brien

Local Attorneys: Mike Bush, Dana Copell, Harold Dane, Ryan Denman, Brenda Drew-Peeples, Dennis Duffy, Amy Kretkowski, Linda Neuman, Molly O'Meara Schnell, Tim Semelroth, Penelope Souhrada

Overview

The open forum commenced at 11:00 a.m. with introductory remarks by Justice Wiggins. Attendees were advised of the history of the advertising rules, the makeup of the Committee, the status of the Iowa advertising rules, the process and timeline for consideration of changes, and the likely effective date of the new rules.

Mike Bush, Member of the Iowa Association for Justice:

Mike Bush read a prepared statement to the panel and audience, about the issue as the IAJ sees it (copy attached). The comments made by Jim Daane at the Council Bluffs forum were reiterated. The IAJ agrees with Mike Giudicessi's analysis of the shortcomings in the current rules, and believes that the Model Rules are a reasonable platform to work from in making changes.

Comments from other attorneys:

- Would lawyers accept some kind of specialization rule? It's naïve to say a lawyer is a lawyer is a lawyer. Consumers must be provided with information so that they can make an informed choice, and so most lawyers would support specializing.
- It's a matter of professionalism to say you're a specialist and take the CLE/ have the expertise to back up the statement. The old rules, which promoted professionalism, have been undercut by the language "General practice including but not limited to..". Attorneys can actually wind up misleading the public by using "General practice including but not limited to", when in reality they only practice in one area.
- Monitoring violations: The internet is wide open and it's impossible to police, especially because many marketers are out-of-state. Phone books are the smaller part of the market. We won't be able to tackle the number of people coming into Iowa via a laptop. The Attorney Disciplinary Board doesn't have the staff or resources to oversee local violations, much less the internet infractions. When a lawyer certifies they've taken the CLE, that's as much as we can expect in terms of monitoring. It's really the lawyer's problem to make sure they're compliant with the Rules.

- General practitioners: Specialization has already occurred; there are not too many truly general practitioners. Law students now aim for a specialty and there is the sense among new lawyers that you can't serve clients well if you dabble in every area.
- Just because it's a lawyer's first day doesn't mean they're limited to certain areas of practice. We really should be doing more mentoring in Iowa.
- Methods of certification of specialization: Some lawyers wouldn't have a problem taking a test every year, but can't complete all the CLE hours to declare a specialization. This method would be very costly and who would oversee it? Very difficult to implement for each area of specialty.
- Firm advertising: One attorney in the firm meeting the CLE requirement for an area of practice is not enough for the firm to advertise a specialty under the current rules.
- Search engines and marketing formats: attorneys need to be very cautious, especially with internet marketing, because you never know what the site host or publisher is going to do with the ad, even after you approve it. There is concern a lawyer could be liable even for internet advertising they don't solicit because some of the sites just add attorneys without their OK. E.g. Google sold an Iowa attorney's name and field of practice to another lawyer- he had to go through a lot to correct the problem and has had to buy additional hits to get better placement in the search engine.
- Quality of services representations: Disallowing all quality of legal service representations, stifles attorneys from advising clients of their expertise. Attorneys should be able to tell about the clients that are satisfied and the cases that have been won. Other professions are allowed to talk about the good work they do. People don't know where to go for help. The prohibition on lawyers against advertising their successes does not serve the public. Instead it hurts the public because they can't get information. Verifiability is a still a valid requirement; other rules require lawyers to not lie in their representations.
- Attorneys ought to be able to advertise their expertise and defend themselves against criticism on review sites. They also ought to be able to proactively protect the profession against companies like LegalZoom that provide forms and tell people they don't need lawyers.
- What kind of ads are Davenport lawyers facing? Direct mail from Illinois is difficult to compete with, and the ads are blatant. Also a problem with rubber-stamping through Iowa attorneys. Illinois attorneys have unlimited advertising. Some Iowa attorneys have moved their practice across the river just so that they can operate under the Illinois advertising rules.
- "Good housekeeping seal of approval" from the Supreme Court /court review of specific ads: since we don't do advisory opinions, there's not enough direction for attorneys that want to advertise. Attorneys would be willing to pay to have their advertisement reviewed and approved. Kentucky has a program like this.
 - : who would interpret the rules? There could potentially be big problems with reading into the content of the advertising. How would you verify terms like "affordable"? And what's misleading (e.g. could be misleading to say we've won 90 cases, without saying we lost 380)?
 - : setting up a method for the Supreme Court to approve specialization would be ok, but having a Commission or panel that critiques ads would not be a good idea.
 - : the Court doesn't have enough money to make a general housekeeping seal valuable in the eyes of the public.
- The current mechanism for adding an area to the list of specialties is complicated. Sometimes legislatively imposed restrictions on advertising conflict with Iowa's rules pertaining to advertising (e.g. with Veterans Law practitioners).
- Iowans are better served by receiving advice from Iowa lawyers.
- Our rules ought to enhance the reputation of the lawyers rather than diminishing them. Rules in the last years have diminished the reputation of attorneys in the eyes of the public.

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- The advertising rules were put in place to protect the public, but may be doing the opposite by preventing attorneys from informing and communicating with the public.
- Our current rules are just too restrictive. A reasonable accommodation is met by the Model Rules and we should be very careful about fiddling with them. The more uniformity in monitoring advertising by lawyers, the better.

Justice Wiggins noted that the Court invites as much criticism and comment as possible when it comes to rule changes, and expressed thanks to the audience for their input.

The open forum concluded at 12:20 p.m.

Statement by IAJ Board Member Mike Bush

to the

Iowa Supreme Court Committee to Study Lawyer Advertising Rules

February 3, 2012

Good morning. My name is Mike Bush. I am a member of the Iowa Association for Justice (IAJ) Board of Governors. Thank you for your considerate attention to our point of view on Iowa's lawyer advertising rules. Our association is exceedingly grateful for your service on this committee, and we hope our perspective will assist you as you weigh potential rules changes.

IAJ serves Iowa trial attorneys and, by extension, the clients they represent. Founded in 1973, the association's objectives (as stipulated in our by-laws) are as follows...

- To uphold and defend the Constitutions of the United States and of the State of Iowa;
- To advance the science of jurisprudence;
- To train in all fields and phases of advocacy;
- To promote the administration of justice for the public good;
- To uphold the honor and dignity of the profession of law; and, especially,
- To advance the cause of those who are damaged in person or property and who must seek redress therefore;
- To encourage friendship among the members of the bar; and
- To uphold and improve the adversary system and the right of trial by jury.

IAJ members practice in a multitude of areas, but most of them have a trial practice for plaintiffs and claimants who are pursuing justice in our administrative and civil courts. Our members fight for justice everyday in courthouses and communities across this great state, and we have the utmost confidence that they will continue to thrive under whatever new rules may come their way. They are dutiful, hardworking, honest, intelligent, resilient, resolute and sincere, and they strive for the highest level of professional competency in their chosen areas of practice. In order to help them meet and surpass their professional obligations to the clients they serve -- through attainment of superior and sustained performance in litigation and trial advocacy -- we offer a variety of continuing legal education seminars each year in disparate fields and phases of advocacy. Hundreds of Iowa attorneys -- IAJ members and nonmembers alike -- attend our seminars throughout the year.

As noted, one of the association's core objectives is to uphold and defend the federal and state constitutions, so we read the constitutional issues survey by Knoll and Giudicessi with great interest. Thank you for providing this analysis to inform consideration of, and debate about, Iowa's lawyer advertising rules. It seems clear upon careful review that Iowa's current lawyer advertising rules are running afoul of evolving commercial speech doctrines and cannot withstand constitutional scrutiny. New rules are in order, and the ABA model rules are a reasonable platform for launching new advertising rules.

Knoll and Giudicesso state unambiguously that the *R.M.J.* decision of 1982 frustrates the Iowa regulations pertaining to lawyer communication of fields of practice and specialization (Rule 32:7.4) and would appear to render them constitutionally futile, at least in large part, if not in whole. Yet there is an immense public benefit to ensuring that lawyers who are holding themselves out as "specialists" in given practice areas actually have prerequisite experience and acumen in those areas. Requiring lawyers to meet minimum annual hourly practice requirements and obtain a modicum of continuing legal education hours in their professed fields of specialty [as per 32:7.4(e)] is an effective way to guarantee this benefit. If these requirements are no longer available due to constitutional imperatives, then another way must be found.

We therefore encourage the committee to consider what can and should be done to at least cajole and entice all Iowa lawyers (in lieu of compelling them) to meet minimum practice and continuing education standards if they elect to hold themselves out as “specialists.”

- Can the Court require that any attorney who states a claim regarding an area of specialization include within such statement specific information as to the percentage of practice concentrated in the area, and/or the number of hours of CLE completed by the attorney in that area of law during the previous calendar year?
- Can the Court at least retain the right to define -- if not actually mandate -- “specialization” parameters, i.e., “specialist” means that an attorney is devoting a certain minimum percentage of practice hours to the specialty area and obtaining a certain minimum number of annual CLE hours in that area?
- Should the court establish a voluntary “Good Advertising Seal of Approval” for lawyers who can demonstrate that they meet or exceed minimum experience and continuing education standards in their professed fields of practice?
- Should the Court retain its authority to approve specialty certification initiatives that may be administered by various bar organizations, instead of “outsourcing” this function, as the ABA rules would allow? (IAJ will urge the Court to retain this authority.)

Thank you again for your considerate attention to our point of view. IAJ is prepared to escalate our own continuing education initiatives to help ensure that Iowa trial lawyers are equipped to meet and surpass their professional obligations in various practice areas, for the sake of the clients they serve. In the meantime, we will continue to monitor and weigh in on these delicate issues at all stages of this process, and we hope you will consider us a partner in your deliberations.